

***United States Court of Appeals
for the Second Circuit***



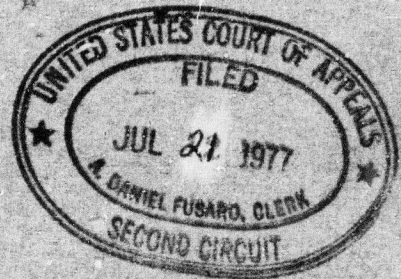
APPELLEE'S BRIEF

77-7209

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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IRVING ELLENTUCK, et al., :
Plaintiffs-Appellants, :
-against- :
JOSEPH B. KLEIN, et al., :
Defendants-Appellees. :

ON APPEAL FROM THE UNITED STATES :
DISTRICT COURT FOR THE SOUTHERN :
DISTRICT OF NEW YORK. :
-----X



BRIEF FOR DEFENDANTS-APPELLEES,
JUSTICES OF THE APPELLATE
DIVISION AND SUPREME COURT

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BRIEF FOR DEFENDANTS-APPELLEES,
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Statement of the Case

This is an appeal from an order and judgment of the United States District Court for the Southern District of New York (Pierce, J.) granting defendants' motions to dismiss and denying plaintiffs' cross-motion for summary judgment.

Nature of the Case

The plaintiffs commenced this action against several parties, including justices of the Appellate Division of the Supreme Court, Second Department, and a justice of the Queens Supreme Court, alleging violations of their constitutional rights. Only the third cause of action was directed against the justices.

Plaintiffs base jurisdiction on 28 U.S.C. § 1343, for alleged violations of 42 U.S.C. §§ 1981 et seq.

The justices moved pursuant to Fed. R. Civ. P. 12(b)(1) and (6) for a dismissal of plaintiffs' amended complaint on the grounds of res judicata and collateral estoppel, as well as on the grounds of lack of subject matter jurisdiction. The other defendants either did likewise or moved for summary judgment pursuant to Fed. R. Civ. P. 56. Plaintiffs then cross-moved for summary judgment under Rule 56. Defendants' motions were granted and plaintiffs' was denied.

Decision of the Court Below

The district court (Pierce, J.) decided that plaintiffs' constitutional challenges to the decision of the Board of Standards and Appeals granting a variance, and its affirmance by the Appellate Division, had been fully litigated in the state courts, and that a final determination on the merits had been made therein.

The Court specifically found that res judicata and collateral estoppel barred the maintenance of the third cause of action questioning the qualification of Justice Latham, citing Lecci v. Cahn, 493 F. 2d 826 (2d Cir. 1974).

Question Presented

1. Was not the district court correct in dismissing the action since all of the issues presented had been fully and finally determined by the state courts?

The district court dismissed the action.

2. Did not the complaint otherwise fail to state a claim upon which relief could be granted?

The district court did not reach the issue.

ARGUMENT

I.

RES JUDICATA AND COLLATERAL ESTOPPEL BAR THIS ACTION.

Where a litigant has pursued his claim in state court, he may not relitigate that claim in federal court under the guise of an action under the Civil Rights Act. Rooker v. Fidelity Trust Co., 263 U.S. 413 (1923). The question here is whether the issue of the alleged disqualification of Justice Latham was fully litigated in the New York courts.

Plaintiffs allege that Justice Latham's alleged disqualifying interest deprived them of their constitutional rights. They pressed this same claim to the Appellate Division, three times to the Court of Appeals, and once again to the Queens County Supreme Court. Each time they lost.

When a judge is disqualified, the court is deprived of subject matter jurisdiction. Wilcox v. Royal Arcanum, 210 N.Y. 370, 104 N.E. 624 (1914).

Lack of subject matter is always in issue. MacAffer v. Boston M.R. Co., 268 N.Y. 400, 197 N.E. 328

(1935); Cutting Room Applicances Corp. v. Finkelstein, 33 A D 2d 674, 305 N Y S 2d 348 (1st Dept. 1969). The issue may be raised for the first time on appeal. Marony v. Applegate, 266 App. Div. 412, 42 N Y S 2d 768 (1st Dept. 1943); Deile v. Boettger, 250 App. Div. 633, 295 N Y S 115 (2d Dept. 1937).

Further, it is axiomatic that a court has jurisdiction, at least to determine if it does indeed have jurisdiction. CPLR 3211. See also, Morrison v. Walker, 404 F. 2d 1046, at 1049 (9th Cir. 1968). Thus, the Appellate Division properly considered the question of its own jurisdiction, and the Court of Appeals necessarily considered the issue in denying and dismissing appeals on that issue.

Mere legal errors do not affect the invocation of res judicata. University of Illinois Foundation v. Blonder-Tongue Laboratories, Inc., 465 F. 2d 380 (7th Cir. 1972), cert. denied 409 U.S. 1061; Adriaanse v. United States, 184 F. 2d 968 (2d Cir. 1950), cert. denied 340 U.S. 932.

This Court has plainly stated that res judicata will be used in § 1983 suits to prevent unnecessary trampling on state court systems. Thistlewaite v. City of New York, 497 F. 2d 339 (2d Cir. 1974), cert.

denied 419 U.S. 1093; Lecci v. Cahn, supra; Tang v. Appellate Division, 487 F. 2d 138 (2d Cir. 1973); Lackawanna Police Benevolent Assn. v. Balen, 446 F. 2d 52 (2d Cir. 1971); Katz v. Connecticut, 433 F. 2d 878 (2d Cir. 1970); Taylor v. New York City Transit Authority, 433 F. 2d 665 (2d Cir. 1970).

In Taylor, supra, the plaintiff had been dismissed from his position with the Transit Authority after an administrative hearing. He later attempted to bring on a petition in the nature of mandamus or prohibition under Article 78 of the New York CPLR, claiming that one of the commissioners who decided his case had been prejudiciously interested in the outcome. The Article 78 proceeding was dismissed because the claim had not been raised at the administrative level. The Second Circuit then affirmed the district court's dismissal of the plaintiff's § 1983 suit on the grounds that the issue had been finally determined in the state judicial system. The plaintiff had elected to pursue his claim in the state court, and must be held to the determination made therein. His only recourse from that determination would be to seek a review by the United States Supreme Court. In accord, Booker v. Fidelity Trust Co., supra.

In Thistlewaite, supra, the Second Circuit went so far as to say that the determination need not have been made pursuant to a clear selection of the state court forum for the resolution of the constitutional claims.

Here, the plaintiffs clearly elected to pursue their claims in the courts of New York. They appealed to the Court of Appeals; they also sought permission to appeal to the Court of Appeals. And, just as in Taylor, they initiated a new Article 78 proceeding in Queens County, before Justice Lerner. In dismissing the petition, Justice Lerner made it quite clear that the state courts had conclusively disposed of plaintiffs' claims, and that no further inquiry into them was to be had.

Thus, there can be no doubt that the state courts have considered plaintiffs' claims and finally determined them. The Appellate Division, the Court of Appeals and the Queens County Supreme Court have all denied relief on plaintiffs' constitutional arguments.*

* That the Court of Appeals dismissed the alleged appeal as of right because no substantial constitutional question was involved (Ellentuck v. Klein, 40 N Y 2d 844 [1976]) only supports the use of res judicata. The same standard is applied in Civil Rights suits. Pierre v. Jordan, 333 F. 2d 951 (9th Cir. 1964), cert. denied 379 U.S. 974.

II.

THE COMPLAINT FAILS TO STATE
A CLAIM NOTWITHSTANDING
RES JUDICATA.

The primary objective in a § 1983 suit must be the redress of federal rights, and where the constitutional claim is advanced mainly to provide access to federal court in order to review a question of state law, the district court cannot take cognizance of the suit. Paul v. Davis, 424 U.S. 693 (1976); Pierre v. Jordan, 333 F. 2d 951, at 958 (9th Cir. 1964), cert. denied 379 U.S. 974.

What the plaintiffs seek herein is actually the nullification of the discretionary decision of a state agency to grant a variance. Section 1983 was clearly not intended to provide for review of such a question.

Furthermore, a mere violation of state court procedural rules does not automatically give rise to a due process claim cognizable under § 1983. Morrison v. Walker, supra; Bottone v. Lindsley, 170 F. 2d 705 (10th Cir. 1948), cert. denied 336 U.S. 944. Plaintiffs rely exclusively on Section 14 of the New York Judiciary Law to establish Justice Latham's disqualification. Due Process is obviously raised for the sole purpose of gaining federal jurisdiction, for the plaintiffs really seek a decision on state law.

CONCLUSION

THE JUDGMENT OF THE DISTRICT COURT
SHOULD BE AFFIRMED AND THE COMPLAINT
SHOULD BE DISMISSED.

Dated: New York, New York
July 18, 1977

Respectfully submitted,

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 : SS :
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PAUL E. DAHLMAN, being duly sworn, deposes and says that he is a Deputy Assistant Attorney General in the office of the Attorney General of the State of New York, attorney for the defendants-appellees Justices of the Appellate Division and Queens County Supreme Court herein. On the 21st day of July, 1977, he served two copies of the annexed brief upon the following named persons:

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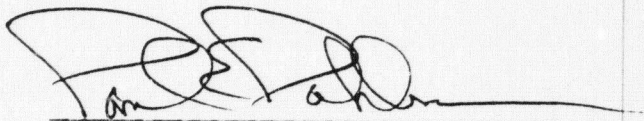
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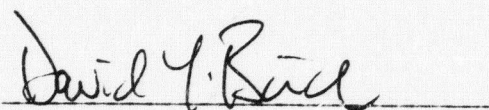
Attorneys in the within entitled appeal by depositing the same, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047 directed to

to said attorneys at the addresses within the State designated
by them for that purpose.

Sworn to before me this
21st day of July, 1977

A handwritten signature in dark ink, appearing to read "Paul E. Dahlgren", written over a horizontal line.

PAUL E. DAHLMAN

A handwritten signature in dark ink, appearing to read "David Y. Burt", written over a horizontal line.

Assistant Attorney General of
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